

Mcglinn (Migration) [2019] AATA 4314 (5 July 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Joseph Charles Mcglinn
VISA APPLICANT:	Ms Hui-Ling Xie
CASE NUMBER:	1722315
DIBP REFERENCE(S):	2016039839
MEMBER:	Peter Smith
DATE:	5 July 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 05 July 2019 at 3:14pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – not genuine spousal partners – no evidence of joint ownership of assets, liabilities, legal obligations, major financial commitments or shared household expenses – minimal evidence parties lived together – minimal evidence of mutual commitment to shared life to exclusion of others – decision under review affirmed

LEGISLATION

Births, Deaths and Marriages Act 1995 (NSW)
Migration Act 1958 (Cth), ss 5, 65
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration (the Minister) on 25 August 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958 (Cth)* (the Act).
2. Hui –Ling Xie (the visa applicant), a national of the People’s Republic of China, made an application to the Minister on 6 February 2016 for the grant of a Partner (Provisional) (Class UF) visa and a Partner (Migrant) (Class BC) visa in which she claimed to be the spouse of an Australian permanent resident, namely the review applicant and her sponsor, Joseph Charles Mcglinn.
3. An application for a Partner (Provisional) (Class UF) visa is made at the same time and place as an application for a Partner (Migrant) (Class BC) visa. The application process involves a two stage process. If an applicant is granted a Partner (Provisional) (Class UF) visa, he or she will be granted a provisional or temporary visa to enter Australia for two years. At the end of the two year period, the relationship is reassessed, and if the Minister is satisfied that the relationship is, amongst other things, genuine and continuing, a permanent Partner (Migrant) (Class BC) visa will be granted.
4. At the time of visa application, the visa class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The Minister’s delegate decided under s.65 of the Act to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa because the primary criteria for it prescribed in clause 309.211 and 309.221 of Schedule 2 to the Regulations had not been satisfied by her at the time of application and at the time of decision, namely that the primary visa applicant was not the spouse of an Australian permanent resident.
6. On 19 September 2017 the review applicant made an application to the Administrative Appeals Tribunal (the Tribunal) seeking a review of the delegate’s decision to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa. Attached to his application for review is a copy of the delegate’s Decision Record dated 25 August 2017.
7. The application for review was heard by the Tribunal on 26 June 2019. At the hearing the review applicant appeared with his authorised representative, a registered migration agent, and gave oral evidence and presented arguments relating to the issues arising in relation to the decision under review. The visa applicant, with the assistance of a Mandarin interpreter, appeared in person and gave oral evidence.
8. For the following reasons, the Tribunal has decided that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the visa applicant is the spouse of the review applicant for the purposes of s.5F of the Act.

10. In considering whether the visa applicant is the spouse of the review applicant the Tribunal has had regard to the evidence on the file of the Department of Immigration and Border Protection (the Department) and the further evidence provided to the Tribunal during the review process, and the oral evidence given by each of the parties at the hearing.

Whether the parties are in a spouse or de facto relationship

11. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian permanent resident.
12. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

13. The review applicant has not claimed any previous marriages or relationships. The visa applicant has claimed one previous marriage which was solemnized on 19 November 2002 and dissolved on 18 May 2012. These claims are supported by the Certificate of Marriage and the Certificate of Divorce both of which were issued by the Household Registration Office, New Taipei City, Taiwan, R.O.C.
14. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties claim to have married each other at Sydney on 6 July 2015. This claim is supported by a copy of a Marriage Certificate issued on 9 July 2015 by New South Wales Registrar of Births, Deaths and Marriages pursuant to the *Births, Deaths and Marriages Act 1995 (NSW)* which records the particulars of the parties marriage as claimed. Based on this evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

The review applicant's oral evidence

15. The review applicant was born in Adelaide on 12 August 1962. He is presently 56 years of age. He lives in a one bedroom apartment in Tempe which he owns. He has lived at this property for approximately 12.5 years. He works as a truck driver delivering freight using his own vehicle. He has done this work for approximately 15 years. His mother and older brother live in Sydney. He and his brother care for their mother who is in poor health.
16. The review applicant told the Tribunal that he first met the visa applicant in person on Albion Street in Surry Hills sometime in May 2014. He said that prior to him meeting the visa applicant he had attended a dental appointment with his dentist. He said that when he saw the visa applicant on the street he was 'immediately attracted' to her so he approached her and started up a conversation with her. He told the Tribunal that although the visa

applicant's proficiency in the English language was not good they talked about whether the visa applicant liked Australia and other 'general things'.

17. After meeting each other and before a relationship between the parties ensued, the parties dated for a little while.
18. The review applicant told the Tribunal that the parties commenced living together in December 2014. He said that the visa applicant moved into his apartment at Tempe before Christmas in December 2014. He told the Tribunal that the parties lived together continuously between December 2014 until around mid-January 2016.
19. In November 2015 the parties opened a joint bank account with the St George Bank. The review applicant told the Tribunal that the account has not been used by the parties for a number of years.
20. In mid-2016 the parties travelled overseas together to China, Hong Kong, Taiwan and Thailand for approximately nine weeks. He said that the parties stayed together during this time and he met the members of the visa applicant's family. The review applicant returned to Australia in March 2016. The visa applicant did not return to Australia with the review applicant. This evidence is supported by the Movement Records in respect of the review applicant.
21. Between December 2014 to January 2016 the review applicant said that he continued to work full time as a driver delivering freight and while he was working the visa applicant was responsible for household chores such as cleaning, cooking and washing but sometimes he and the visa applicant did the grocery shopping together. In the relevant period, the review applicant told the Tribunal that because he was able to, he paid for all household expenses including the electricity, rates, grocery shopping and the registration fees for his car and truck. He said that he and the visa applicant shared the same bedroom.
22. The review applicant told the Tribunal that he proposed marriage to the visa applicant because he loved her and it was the right thing to do. He purchased a wedding ring. The parties married each other at the Births, Deaths and Marriage Registry on 6 July 2015 and they went on a honeymoon to Terrigal Hotel and Melbourne.
23. Between April 2018 to June 2019 the review applicant said that he and the visa applicant and her daughter shared a household at his apartment in Tempe. In the relevant period, the visa applicant was responsible for household chores such as cleaning, cooking and washing but like previously sometimes he and the visa applicant went grocery shopping together. The review applicant was responsible for all the expenses associated with the household. He said that he and the visa applicant shared the same bedroom and the visa applicant's daughter slept on a bed in the lounge room.
24. The review applicant told the Tribunal that he has developed a relationship with the visa applicant's daughter, and during the times he has spent with her he has shared in the responsibility for the care and support of her including taking her swimming to the beach at both Bondi and Watson Bay. Sometimes the visa applicant would accompany them.
25. The review applicant gave evidence that if the visa applicant were granted a visa to live in Australia the parties would live together at the review applicant's apartment but would buy a larger property. The review applicant said that this was possible because the visa applicant 'has money' including money in the share market. When the Tribunal asked the review applicant why he sent money to the visa applicant if she had money he said so that the visa applicant and her daughter 'could have a better life' and it was to help the review applicant

because she was caring for her sister at a rehabilitation clinic who had suffered a brain injury in December 2018 following a motor scooter accident.

26. The review applicant also told the Tribunal that he and the visa applicant wanted to have children together, that they had been trying.
27. The review applicant gave evidence that he and the visa applicant socialises together and with their friends in Australia by going out for dinner and taking short trips together and playing table tennis.
28. In addition to the review applicant nominating the visa applicant as the beneficiary of his superannuation, he has also made a Will leaving all of his property to the visa applicant and/or her daughter in the event that the visa applicant predeceases her daughter. A copy of the Will was provided to the Tribunal prior to the hearing of the application.
29. The review applicant gave evidence that in 2016, 2017, 2018 and 2019 he and the visa applicant stayed with each other at the homes of the visa applicant's family. He said that during these periods the visa applicant did the cooking, the cleaning and shopping and her family covered all of the household expenses.
30. The review applicant told the Tribunal that he has met the visa applicant's former husband but knows nothing about him other than what is recorded on the visa applicant's daughter's birth certificate.

31. *The visa applicant's oral evidence*

32. The visa applicant was born in Fukien, China on 10 February 1978. She is presently 41 years of age. She currently lives in Taipei City, Taiwan. She does not work. She says she has sole custody of her daughter however she is not included on the visa application as a member of the visa applicant's family unit. The visa applicant told the Tribunal that she is the youngest of seven children.
33. The visa applicant gave evidence to the Tribunal that she first met the review applicant in person in Sydney in May 2014. She told the Tribunal that she commenced living with the review applicant at his apartment in Tempe in December 2014 and stayed living with the review applicant until January 2016 at which time she and the review applicant went to China.
34. There is evidence before the Tribunal; provided by the review applicant contained in delegate's decision at p. 11, that the visa applicant's residential address. During part of the period she claims to have been living with the review applicant (December 2014 to January 2016), the visa applicant had stated in a protection visa application that she lived in Newcastle.
35. The visa applicant told the Tribunal that after meeting the review applicant the parties went on dates together. The visa applicant told the Tribunal that both she and the review applicant proposed to each other.
36. The visa applicant gave consistent evidence to that of the review applicant that during the period December 2014 to January 2016 while living with the review applicant at his apartment that the review applicant worked full time. She said that she would do the cleaning and cooking and washing sometimes they would do the grocery shopping together.
37. The visa applicant told the Tribunal that she and the review applicant socialise together and with their friends. She told the Tribunal that the parties largely socialised with friends outside

of the house. She said that the parties go out in the city for dinner, to have fun and have visited a temple at Wollongong.

38. The visa applicant gave evidence before the Tribunal that she has met members of the review applicant's family including his mother and brother and his son and her former wife.
39. When asked by the Tribunal whether she and the review applicant continued to operate their joint bank account the visa applicant said that they seldom use it and that she 'forgot about it'. She told the Tribunal that the parties do not have any joint liabilities.
40. When asked by the Tribunal what she and the review applicant had planned for their future the visa applicant told the Tribunal that she and the review applicant would buy a larger property, she would study English and bring a sum of money from China.
41. The visa applicant told the Tribunal that she owned two properties in China. She said she owned an apartment and that her mother lives in it. She said also that her older sister and niece purchased a house she owns a house with her elder sister and niece. She told the Tribunal that she has money invested in her brother's business and on the share market.
42. When asked by the Tribunal why the review applicant needed to send her money given her financial position the visa applicant responded by saying that it was the good will of the review applicant.
43. The parties told the Tribunal they stay in touch with one another by using Line, We Chat and/or facebook.

Are the other requirements for a spouse relationship met?

44. *Financial aspects of the parties' relationship*

45. In considering the financial aspects of the parties' relationship, I have had regard to all of the circumstances of the relationship, including whether the parties jointly own any real estate or other major assets, whether the parties have any joint liabilities, the extent of any pooling of financial resources, especially in relation to major financial commitments, whether one party in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of day-to-day household expenses.
46. I also take into account the practical difficulties couples in a relationship living in different countries may find it difficult share the financial aspects of their relationship in any substantial way.
47. There parties both said before the Tribunal that the parties jointly own any real estate or other major assets. There is however evidence before the Tribunal that the parties intend to purchase a larger property if the visa is granted but did not indicate they had progressed with the plan, or that they had done any research in Australia.
48. There is evidence before the Tribunal that the review applicant owns his own property in Sydney and that the visa applicant owns her own property in China and property with other members of her family.
49. From what the parties have told the Tribunal there is no evidence before the Tribunal that the parties have any joint liabilities.
50. There is evidence before the Tribunal that the parties opened a joint bank account in November 2015 nearly some 12 months after the parties claim to have shared a household

together, however the statements held on the Department's do not record minimal transactions. Based on this evidence and the evidence given by the parties, I am not satisfied that the parties have pooled their financial resources in any substantial way, especially in relation to major financial commitments.

51. There is evidence that the review applicant has sent the visa applicant monies and evidence that the review applicant has been responsible for the payment of day to day expenses such as utility bills, vehicle registration and rates all of which are in the name of the review applicant. There is no verifiable evidence (apart from hotel invoices in 2017) at sharing household expenses when the review applicant lived with the visa applicant and members of her family overseas in 2016, 2017, 2018 and 2019.
52. There is evidence before the Tribunal that the review applicant in 2015 nominated the visa applicant as his beneficiary in respect of his superannuation and that he has made a Will on 21 May 2019 leaving all of his property to the visa applicant and/or to her daughter, however this evidence alone is given limited weight as there is little detail in it and Wills can easily be revoked.
53. The Tribunal has not been provided with any evidence that either party to the relationship owes any legal obligation in respect of the other.

54. ***The nature of the parties' household***

55. In considering the nature of the parties' household, I have had regard to all of the circumstances of the relationship, including whether the parties have any joint responsibility for the care and support of children, the living arrangements of the parties, and whether the parties share in the responsibility for housework.
56. The parties do not share in the responsibility for the care and support of children of their own. The visa applicant and her former husband have a young daughter together. The visa applicant says she has sole custody of her daughter. I note that the parties claim that the child will come and live with the parties in Australia; however I note that the visa applicant's daughter has not been included on the visa application as a member of the visa applicant's family unit.
57. I am therefore not satisfied that the parties will have the responsibility for the care and support of the visa applicant's young daughter. I do however give some weight to the fact that the review applicant has spent time with the visa applicant's daughter.
58. The parties have given oral evidence about their future plans if a visa is granted to the visa applicant. However, I appreciate the difficulties couples in a relationship face when living in separate households in different countries. I therefore give this some weight.
59. The Tribunal notes that there has been fairly consistent evidence given by each of the parties at the hearing that when the parties shared a household together at the review applicant's apartment the visa applicant was responsible for the housework. However, based on this evidence alone, and without any additional or independent supporting evidence, I am not satisfied that the parties have shared in the responsibility for housework during the times they shared a household and give it limited weight.
60. The Tribunal notes that there has been fairly consistent evidence given by each of the parties at the hearing that when the parties shared a household together at the homes of the visa applicant's families the visa applicant was responsible for the housework. However, based on this evidence alone, and without any additional or independent supporting

evidence, I am not satisfied that the parties have shared in the responsibility for housework during the times they shared a household and give it limited weight.

61. ***The social aspects of the parties' relationship***

62. In considering the social aspects of the parties' relationship, I have had regard to all of the circumstances of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship, and the basis on which the persons plan and undertake joint social activities.
63. The Tribunal has before it a number of photographs of the parties and others including members of the parties' families and witness statements from the review applicant's mother and brother. Based on this evidence I am satisfied that the parties family see the parties' relationship as a genuine and that of a married couple however I am not satisfied that this evidence extends to social recognition of their relationship by the wider community including the parties friends in either China and/or Australia, where the parties claim where the parties claim to have spent time together as a married couple.

64. ***The nature of the parties' commitment to each other***

65. In considering the nature of the parties' commitment to each other, I have had regard to all of the circumstances of the relationship, including the duration of their relationship, the length of time during which the parties' have lived together, the degree of companionship and emotional support that the parties draw from each other, and whether the parties see their relationship as a long-term one.
66. The parties met in May 2014 and claim to have commenced living together in December 2014, and were legally married on 6 July 2015. The parties were consistent in their evidence about when they first meet each other and when they married each other. The Tribunal is therefore satisfied that the parties met in May 2014 and were for the purposes of the Act, validly married on 6 July 2015.
67. The Tribunal has however minimal evidence before it to be satisfied that the parties have lived together during the periods they claimed. Apart from the medical records provided bearing the visa applicant's name and the review applicant's address in Temple, I weigh this against the evidence recorded on the Tribunal's decision that the visa applicant had another address in Newcastle during the relevant period (December 2014 to January 2016) in which she claims to have lived with the review applicant at his apartment.
68. The Tribunal is not satisfied that that the parties have lived together. There is minimal verifiable evidence before the Tribunal (apart from medical records addressed to the visa applicant at the review applicant's address) that the parties have lived together in the periods in which is claimed. There is also minimal evidence (apart from hotel invoices) that the parties have shared a household while overseas together.
69. Although there is some evidence on the Department's file that shows online communication between the parties however the Tribunal notes that there is no recent evidence of online communication between the parties using such resources as Line, WeChat or facebook to show that the parties stay in contact with each other when living different countries to draw companionship and emotional support from one another.
70. There is minimal evidence before the Tribunal to be satisfied that there is a mutual commitment between the parties to a shared life to the exclusion of all others, and it therefore follows I am not satisfied that the parties' relationship is genuine.

71. For the purposes of s.5F(2)(b) of the Act, I am not satisfied in the preset case that there is a mutual commitment to a shared life to the exclusion of others.
72. Based on the evidence above and for the reasons given, I am not satisfied under s.5F(2)((b)-(d) of the Act that the parties have a mutual commitment to a shared life together to the exclusion of all others, that their relationship is genuine and continuing relationship and that they do not live together a permanent basis.
73. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
74. Therefore the visa applicant does not meet the requirements in cl.309.211 and cl.309.221.
75. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

76. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Peter Smith
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).